Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-922

D. ALWYN STIVERS & WALTER B. CHERRY,
Appellants,

vs.

STATE OF MINNESOTA, MINNESOTA STATE BAR ASSOCIATION, HENNEPIN COUNTY DISTRICT COURT, JUDGE STANLEY D. KANE, GARY FLAKNE, AS HENNEPIN COUNTY ATTORNEY AND WARREN SPANNAUS AS STATES ATTORNEY GENERAL,
Respondents.

JURISDICTIONAL STATEMENT

D. Alwyn Stivers
Attorney Pro Se
1712 Lincoln Ave.
St. Paul, MN.55105
(612) 699-9108

Walter B. Cherry
Attorney Pro Se
6960 10th St. #108
St. Paul, MN. 55119
(612) 735-4302

Attorneys for Petitioners

December 29, 1976

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IN THE

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vs.

STATE OF MINNESOTA, MINNESOTA STATE BAR ASSOCIATION, HENNEPIN COUNTY DISTRICT COURT, JUDGE STANLEY D. KANE, GARY FLAKNE AS HENNEPIN COUNTY ATTORNEY AND WARREN SPANNAUS AS STATES ATTORNEY GENERAL,
Respondents.

JURISDICTIONAL STATEMENT

The appellants, D. Alwyn Stivers, and Walter B. Cherry, respectfully pray, that the U.S. Supreme Court take jurisdiction, accept this direct appeal and remand this case to the lower court with directions to hear appellants' constitutional claim.

JURISDICTIONAL STATEMENT

I.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW

1.1 Official reports:

The opinion delivered by the Court below, is reported at 419 F. Supp. 87 (1976).

1.2 Unofficial reports:

The opinion was also reported in the Family Court Reporter, at 2 FLR 2012.

II.

GROUNDS

2.1 The nature of the proceedings:

This is a civil rights action for injunction and declaratory judgment against the harassment under color of enforcement by state officials and their agents, of the Minnesota Statute purporting to regulate the unauthorized practice of law within the state by actions; including actions brought by private legal organizations, causing such chilling effect as to deprive appellants of their rights, privileges, immunities and protections afforded by the United States Constitution.

2.2 The statute being attacked:

Appellants claim that Minnesota State Statute 481.02, Unauthorized Practice of Law, is unconstitutional as applied to their activities. Said statute can be found in volume 27 of the Minnesota Statutes Annotated. (Appendix, P.6a)

2.3 Pertinent dates relative to this appeal; Rule 15, 1b (ii):

This is an appeal from an Order of a three-judge court, entered September 10, 1976, and from an Order denying rehearing dated October 5, 1976. The Notice of Appeal was filed herein on the 4th day of November, 1976 in the U.S. District Court, District of Minnesota, Fourth Division, at the U.S. District Courthouse, 110 South Fourth Street, Minneapolis, Minnesota. (Appendix)

2.4 Act of Congress which confers jurisdiction on the Supreme Court:

Jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C.A. §1253 which reads as follows:

> "§1253. Direct appeals from decisions of three-judge courts
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

2.5 Cases believed to sustain the jurisdiction:

Adams v. American Bar, 400 F.Supp 219
American Trial Lawyers Assn. v. New Jersey Supreme Court, 409 U.S. 467
Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663
Bigelow v. Virginia, 95 S.Ct. 222
Bodie v. Connecticut, 401 U.S. 371
Broadrick v. Oklahoma, 413 U.S. 601
Carter v. Stanton, 405 U.S. 669, 92 S. Ct. 1232, 31 L.Ed. 2d 569
Damico v. California, 389 U.S. 416
Doud v. Hodge, 350 U.S. 485, 76 S.Ct. 491, 100 L.Ed. 577
Faretta v. California, 43 U.S.L.W. 5004
Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947
Florida Lime & Avocado Growers v. Jacobson, 362 U.S. 73, 80 S.Ct. 568, 4 L. Ed. 2d 568
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Gooding v. Wilson 405 U.S. 518
Granite Falls State Bank v. Schneider, 402 U.S. 1006, 91 S.Ct. 2187, 29 L. Ed. 2d 428
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Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 113, 31 L.Ed.2d 424
Mitchum v. Foster, 407 U.S. 225
Richardson v. Kennedy, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800
Steffel v. Thompson, 415 U.S. 452
Thomas v. Collins, 323 U.S. 516
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Younger v. Harris,401 U.S. 37
Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L.Ed.2d 444

III.

QUESTION PRESENTED

Whether it was error for the trial court to include the herein appellants in a total dismissal of the lower court action prior to trial.

IV.

STATEMENT OF THE CASE SUBSTANTIAL FEDERAL QUESTION

4.1 Concise statement of facts:

In March 1974 the Minnesota State Bar Association (MSBA) commenced a civil suit in the Hennepin County District Court of Minnesota, against Charles T. Thibodeau, Donna Thibodeau and Divorce Education Associates, Inc., a defunct non-profit corporation, charging the defendants with the unauthorized practice of law.

In February 1975 the MSBA attempted to amend its action against the Thibodeaus by adding a defendant, Divorce Education Association, an unincorporated non-profit association, in which the Thibodeaus, Stivers and Cherry are members. 1/ The Bar Association's attempt to amend was denied.

In April 1975 the MSBA initiated a new law suit against Divorce Education Association. Again this attempt to involve Divorce Education Association and its members, including appellants Stivers and Cherry failed in dismissal

without prejudice of the suit. Hence, the State Court left the door open for future suits against Stivers and Cherry.[2]/

This Supreme Court must understand the distinction between Divorce Education Associates, Inc. and Divorce Education Association, the former organization is a state court litigant, the later is not but is threatened with suit and has been sued. The MSBA fully intends to sue said Divorce Education Association and appellants if they recommence operations.

Divorce Education Association is an association of people who gather together for the purpose of sharing information and ideas and of teaching each other the rudiments of process and procedures of the court functions. In addition, the Association provides a forum within which members can espouse their beliefs and ideas about the divorce system and a place to work together to effect legislative changes relating to the matter of divorce.

1/ There are two separate and distinct organizations considered in this action. The names are so similar that they are easily mistaken. The defendant in the state court action is Divorce Education Associates, Inc.; the organization to which appellants belong is called Divorce Education Association. Footnote #1 of the court order, (Appendix 16a), erroneously refers to Divorce Education Associates, Inc.

2/ See Appendix, page 17a, Judge Lebedoff's Order and Memorandum.

Appellants joined the Thibodeaus in commencing this suit in October 1975 prior to the State Court trial which commenced January 5, 1976. Appellants requested the State Court proceedings be enjoined and that a three-judge court be empaneled to hear their Federal question.

The Federal Court injunction was denied by Judge McManus and a three-judge court was empaneled.

The State Court proceedings came to judgment on the single issue of whether or not the Thibodeaus' activities within Divorce Education constituted the practice of law; deciding that the activities were the practice of law and that it violated the pertinent Minnesota Statute.[3]/

As a consequenct of this, Divorce Education Association elected to suspend its operations pending determination of the herein issues to preclude sacrificing any more members to the state official police powers. Members are afraid to exercise their desire to assemble and carry on their mutually beneficial association.

3/ See Appendix, page 16a, Footnotes. Judge Kane, in his Memorandum, on his own theory of class action attempts to enjoin Divorce Education Association and appellants without service of process and without alowing the class to defend - - an obvious denial of due process.

4.2 Substantial Federal Questions:

Members of organizations have a Constitutionally guaranteed right to collective group activity to obtain meaningful access to the courts. United Transportation Union v. State Bar of Mich., 401 U.S. 576. (U.S. Constitution Amendment 14). Self-representation is a constitutionally protected right. Faretta v. California. (U.S. Constitution Amendments 6, 9, 14). Thus appellants, Stivers and Cherry, who meet in collective group activity for the purpose of learning to obtain meaningful access to the courts through self-representation have a constitutionally protected right to do so.

4.3 Question on this appeal:

The lower court never reached the merits of the Federal question. Instead the court decided to dismiss the action in accordance with Younger v. Harris, 401 U.S. 37, citing Federalism and comity as grounds for said dismissal. The lower court erred because in Younger v. Harris, supra, the U.S. Supreme Court expressed no view regarding the circumstances under which Federal courts may act when there is no prosecution pending against appellants in state courts at the time the Federal suit was commenced.

The Younger decision points out that in situations where non-state-court litigants can show that they would be prosecuted for the conduct they planned to engage in and the District Court found this to be true, then a genuine issue would exist as to them.[4]/ This is also true in a setting where one or more of

the plaintiffs are being prosecuted in state court, as in the instant action.

Appellants Stivers and Cherry were not being prosecuted in state court at the commencement of this action. It was proved in the court below that they would be prosecuted if they engaged in further activities as members of Divorce Education Association.[5]/ It was further shown that they are presently suffering irreparable harm in terms of deprivation of natural rights, protected by the U.S. Constitution Amendments 1, 6, 9, and 14. Thus the lower court erred by including appellants in its dismissal of the state court action.

Although the three-judge court did not expressly argue the merits of appellants' Federal question, this court has on several occasions entertained direct appeals from three-judge court orders denying injunctions on grounds short of the merits. See Florida Lime and Avocado Growers v. Jacobson, 362 U.S. 73; Baker v. Carr, 369 U.S. 186; Flast v. Cohen, 392 U.S. 83; Richardson v. Kennedy, 401 U.S. 901; Granite Falls State Bank v. Schneider, 402 U.S. 1006; Lynch v. Household Finance, 405 U.S. 538; Carter v. Stanton, 405 U.S. 669; Doud v. Hodge, 350 U.S. 485; Zwickler v. Koota, 389 U.S. 241; Mitchum v. Foster, 407 U.S. 225; American Trial Lawyers Assn. v. New Jersey Supreme Court, 409U.S.467.

4/ See Appendix, page 17a

5/ See Appendix, page 17a

The question of jurisdiction partly turns on whether the three-judge court was correctly convened. Judge McManus found in his Order of December 10, 1975,

1. That the Federal question raised was substantial.
2. The action sought to enjoin state officials from executing statutes of statewide application and
3. The complaint at least formally alleged a basis for equitable relief.

Thus, conditions precedent to convening a three judge court under 28 USC § 2281 and 2284 were met.

In addition, it is not entirely true to say that the lower court did not reach the Federal question at all. The dismissal of appellants complaint has the effect of upholding the Constitutionality of the statute, and in part, the lower court's decision was based on Judge Kane's adverse determination on the merits of the Thibodeaus constitutional attack on the statute in their state court action.[6]/ Thus, as a means of accelerating a final determination on the merits, this court should accept this direct appeal, remand this case back to the three-judge court, reinstate appellants complaint and direct the lower court to consider appellants' constitutional claim.

6/ See Appendix, page 11a

CONCLUSIONS

The rights asserted by the appellants and which were denied by the three-judge court below are of great general importance to the public interest. Appellants Cherry and Stivers have no voice in the state court proceeding and their interests cannot be protected by any remedies that are available to the other lower court plaintiffs, the Thibodeaus.

Appellants Cherry and Stivers believe not only that the activities of Divorce Education Association, including the employment of paid, full-time employees such as the Thibodeaus, would be found by the Federal court to be rights protected by the U.S. Constitution but also that in the absence of that determination a continuation of those activities on their part, or at the hands of other members of the Association, will result in more lawsuits, likely by the same Minnesota State Bar Association, which would have to be defended against at great expense of time, energy and money in a manner identical to that experienced by the Thibodeaus, a consequence which in consideration of the foregoing circumstances they now ask that the Federal court preclude, pending its further clarification.

Any party, to any civil action, suit or proceeding, required to be heard and determined by a district court of three judges, may appeal directly to the U.S. Supreme Court, from an order denying an interlocutory or permanent injunction. This is spelled out in an Act of Congress, 28 USC § 1253.

In this case, the lower court, "civil action," was a "suit" which was "required to be heard and determined by a district court of three judges," and the lower court's dismissal of the complaint constitutes an "order denying an interlocutory or permanent injunction" against enforcement of Minn. Stat. 481.02. Thus this appeal is properly brought directly to the U.S. Supreme Court, because all prerequisites have been met within the intent of Act of Congress, 28 USC §1253.

FOR ALL THE FOREGOING REASONS APPELLANTS RESPECTFULLY REQUEST THAT THE UNITED STATES SUPREME COURT TAKE JURISDICTION TO HEAR THE MERITS OF THIS APPEAL.

Dated, Minneapolis, Minnesota,

December 29, 1976

Respectfully submitted,

D.Alwyn Stivers
Attorney Pro-se
1712 Lincoln Ave.
St.Paul, MN. 55105
(612) 699-9108

Walter B. Cherry
Attorney Pro-se
6960 10th St. #108
St.Paul, MN. 55119
(612) 735-4302

APPENDIX

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CHARLES T. THIBODEAU, DONNA THIBODEAU, D. ALWYN STIVERS AND WALTER B. CHERRY, Plaintiffs,

vs.

STATE OF MINNESOTA; MINNESOTA STATE BAR ASSOCIATION, a Minnesota Corporation; HENNEPIN COUNTY DISTRICT COURT; STANLEY KANE, as District Court Judge for the Hennepin County District Court; GARY FLAKNE, as County Attorney for the County of Hennepin; and WARREN SPANNAUS, as Attorney General of the State of Minnesota, Defendants.

No.4-75 Civil 550

ORDER

This matter is before the court on plaintiffs Walter B. Cherry and D. Alwyn Stivers' resisted motion for new trial, amended finding, and amended judgment filed September 21, 1976.

Both motions assert that the original Finding and Order are not supported by evidence, is contrary to law, and that these plaintiffs continue to have standing and that the principles of comity and Federalism do not apply to these plaintiffs.

From a review of the record it is the view of the court that the original Finding and Order are amply supported by the law and evidence, and that the principles of comity and Federalism set out therein are equally applicable to these plaintiffs in light of their close association with the defendants in the state action making it impossible to rule on their claim without in effect annulling the state proceedings.

It is therefore

ORDERED

Denied.

Filed Oct 6 1976
Harry A. Sieben, Clerk

October 5, 1976.

By Cyndie Bentzen
Deputy

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
United States District Court

FOR THE COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Charles T. Thibodeau, et al, Plaintiff	)	No.4-75 Civil 550
-vs-	)	Clerk's Notice Under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure
State of Minnesota, et al Defendant	)	

You are hereby notified that in the above-entitled cause, on the 6th day of October, 1976 we filed Judge McManus' Order that plaintiffs Walter B. Cherry and D. Alwyn Stivers' resisted motion for new trial, amended finding and amended judgment filed September 21, 1976 is denied. (Dated 10-5-76).

HARRY A. SIEBEN, CLERK

By: /s/ Cyndie Bentzen
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Charles T. Thibodeau, Donna Thibodeau, D. Alwyn Stivers and Walter B. Cherry,

Plaintiffs,

vs.

State of Minnesota; Minnesota State Bar Association, a Minnesota Corporation; Hennepin County District Court; Stanley Kane, as District Court Judge for Hennepin County District Court; Gary Flakne, as County Attorney for the County of Hennepin; and Warren Spannaus as Attorney General of the State of Minnesota,

Defendants.

CIVIL ACTION
File No.4-75-550

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

TO: THE CLERK OF THE ABOVE COURT AND THE DEFENDANTS ABOVE-NAMED AND THEIR ATTORNEYS, THOMAS H. JENSEN,

Special Assistant Attorney General, 160 State Office Building, St. Paul MN. 55155; JERRY CHAPMAN, Asistant Hennepin County Attorney, 2000-A Hennepin County Government Center, Mpls., MN.; MORLEY FRIEDMAN, Attorney for Defendant Minnesota State Bar Association, W-1177 First National Bank Building, St. Paul, MN., 55101; JAMES R. GOWLING, Association Counsel for Defendant Minnesota State Bar Association, 707 Degree of Honor Bldg., St.Paul, MN. 55101.

PLEASE TAKE NOTICE that the plaintiffs, D. Alwyn Stivers and Walter B. Cherry, appeal to the United States Supreme Court from the Order entered herein on the 6th day of October 1976, denying plaintiffs' Motion for New Trial, amended Findings and Amended Judgment and from the whole thereof, in accordance with 28 U.S.C.A. Sect. 1253, and Rule 10 of the Rules of the United States Supreme Court, Washington, D.C.

Dated this 28 October, 1976.

/s/ D. Alwyn Stivers
D. Alwyn Stivers
1712 Lincoln Ave.
St. Paul, MN. 55105
690-9108

/s/ Walter B. Cherry
Walter B. Cherry
6960 10th St. #108
St.Paul, MN. 55119
735-4302

MINNESOTA STATUTE
UNAUTHORIZED PRACTICE OF LAW
§481.02

481.02 Unauthorized practice of law

Subdivision 1. Prohibitions. It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except in his own behalf as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out himself or themselves as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.

Subd. 2. Corporations. No corporation, organized for pecuniary profit, except an attorney's professional corporation organized under chapter 319A, by or through its officers or employees or any one else, shall maintain, conduct, or defend, except in its own behalf when a party litigant, any action or proceeding in any court in this state, or shall, by or through its officers or employees or any one else, give or assume to give legal advice or counsel or perform for or furnish to another person or corporation legal services; or shall, by word, sign, letter, or advertisement, solicit the public or any person to permit it to prepare, or cause to be prepared, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or hold itself out as desiring or willing to prepare any such document, or to give legal advice or legal services relating thereto or to give general legal advice or counsel, or to act as attorney at law or as supplying, or being in a position to supply, the services of a lawyer or lawyers; or shall to any extent engage in, or hold itself out as being engaged in, the business of supplying services of a lawyer or lawyers; or shall cause to be prepared any person's will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or any other legal document, for another person, firm, or corporation, and receive, directly or indirectly, all or a part of the charges for such preparation or any benefits therefrom; or shall itself prepare, directly or through another, any such document for another person, firm, or corporation, except as provided in subdivision 3.

Subd. 3. What permitted. The foregoing shall not prohibit any one from drawing, without charge for so doing, any document to which he, or a person whose employee he is or a firm whereof he is a member or a corporation whose officer or employee he is, is a party, except another's will or testamentary disposition or instrument of trust serving purposes similar to those of a will; and shall not prohibit a person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law; and shall not prohibit any one, acting as broker for the parties or agent of one of the parties to a sale or trade or lease of property or to a loan, from drawing or assisting in drawing, with or without charge therefor, such papers as may be incident to such sale, trade, lease, or loan; and shall not prohibit any insurance company from causing to be defended, or from offering to cause to be defended through lawyers of its selection, the insureds in policies issued or to be issued by it, in accordance with the terms of such policies; and shall not prohibit one such licensed attorney at law from acting for several common-carrier corporations or any of its subsidiaries pursuant to arrangement between said corporations; and shall not prohibit any bona fide labor organization from giving legal advice to its members in matters arising out of their employment; and shall not prohibit any person from conferring or cooperating with a licensed attorney at law of another in preparing any legal document, if such attorney is not, directly or indirectly, in the employ of such person or of any person, firm, or corporation represented by such person; and shall not prohibit any licensed attorney at law of Minnesota, who is an officer or employee of a corporation, from drawing, for or without compensation, any document to which the corporation is a party or wherein it is interested personally or in a representative capacity, except wills or testamentary dispositions or instruments of trust serving purposes similar to those of a will, but any charge made for the legal work connected with preparing and drawing such document shall not exceed the amount paid to and received and retained by such attorney, and such attorney shall not, directly or indirectly, rebate the same to or divide the same with such corporations; and shall not prohibit any person or corporation from drawing, for or without a fee, farm or house leases, notes, mortgages, chattel mortgages, bills of sale, deeds, assignments, satisfactions or any other conveyances except testamentary dispositions and instruments of trust; and shall not prohibit a licensed attorney at law of Minnesota from rendering to a corporation legal services to itself at the expense of one or more of its bona fide principal stockholders by whom he is employed and by whom no compensation is, directly or indirectly, received for such services; and shall not prohibit any person or corporation engaged in the business of making collections from engaging or turning over to an attorney at law for the purpose of instituting and conducting suit or making proof of claim of a creditor in any case in which the attorney at law receives the entire compensation for such work; and shall not prohibit any regularly established farm journal or newspaper, devoted to general news, from publishing a department of legal questions and answers thereto, made by a licensed attorney at law, if no such answer be accompanied or at any time preceded or followed by any charge for such answer, any disclosure of any name of the maker of any answer, any recommendation of or reference to any one to furnish legal advice or services, or by any legal advice or service for such periodical or any one connected with it or suggested by it, directly or indirectly.

Subd. 8. Penalty; injunction. Any person or corporation, or officer or employee thereof, violating any of the foregoing provisions shall be guilty of a misdemeanor; and, upon conviction thereof, shall be punished as by statute provided for the punishment of misdemeanors. It shall be the duty of the respective county attorneys in this state to prosecute violations of this section, and the district courts of this state shall have sole original jurisdiction of any such offense under this section.

In lieu of criminal prosecution above provided for, such county attorney or the attorney general may, in the name of the State of Minnesota, or in the name of the state board of law examiners, proceed by injunction suit against any violator of any of the provisions above set forth to enjoin the doing of any act or acts violating any of said provisions.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Charles T. Thibodeau, Donna Thibodeau, D. Alwyn Stivers and Walter Cherry,

Plaintiffs, No. 4-75 Civil 550

vs. ORDER

State of Minnesota; Minnesota State Bar Association, a Minnesota Corporation; Hennepin County District Court; Stanley D. Kane, as District Court Judge for the Hennepin County District Court; Gary Flakne, as County Attorney for the County of Hennepin; and Warren Spannaus, as Attorney General of the State of Minnesota,

Defendants.

The matter is before the three-judge panel on defendants' motions to dismiss and for summary judgment and plaintiffs' motion to amend and for temporary restraining order order. All motions have been resisted.

The facts leading up to the present motions are simple and undisputed. On March 26, 1974 the Minnesota State Bar Association commenced an action in the Hennepin County District Court against Charles T. Thibodeau and Donna Thibodeau (Thibodeau) pursuant to §481.02 Minn.

Stat. seeking to enjoin them from the unauthorized practice of law and to compell the repayment of all monies received for legal counseling. The Thibodeaus actively participated in this action for over a year before they filed this action in Minnesota Federal Court on October 29, 1975. This action, filed pro se under 28 USC §2201 and 42 USC § 1983, sought declaratory, injunctive and damage relief from the defendants on the basis of the unconstitutionality of §481 .02 Minn. Stat.

After all of the judges in that district disqualified themselves because of their membership in the Minnesota State Bar Association, this action was assigned to Judge McManus on November 10, 1975. On December 10, 1975 Judge McManus denied plaintiffs' request for a temporary restraining order which could have halted the state proceeding, and requested that a three-judge panel be convened pursuant to 28 USC §2284. Ruling was reserved on the pending motions to dismiss, and the three-judge court was convened on December 22, 1975.

The state trial commenced on January 5, 1976 and Judge Kane issued his decision on May 12, 1976 finding that the Thibodeaus had engaged in the unauthorized practice of law and enjoining further such activity by the Thibodeaus and Divorce Education Associates, Inc.1/ but denying request for reimbursement of legal fees. In his memorandum ~~attached~~

attached to the order, Judge Kane gave consideration to all of the constitutional arguments urged by plaintiffs in this actions and ruled adversely to plaintiffs on each point.

After the injunction was issued by Judge Kane, Thibodeau filed a motion to amend in this action and applied to the state court for a new trial, stay pending appeal and clarification of the scope of the injunction. These motions were denied on July 28, 1976.

In their motion to amend, plaintiffs seek to add an allegation of a conspiracy under 42 USC §1985(3), and bad faith prosecution and request that Judge Kane's order be enjoined and set aside. Plaintiffs' proposed amendment, insofar as it attempts to state a claim under §1985(3), fails because it alleges no racial or class-based invidious discrimination on defendants' part.[2]/ However, it does appear to attempt to set forth extraordinary circumstances which would entitle plaintiffs to injunctive relief, notwithstanding the principles of Younger v. Harris, 401 U.S. 37 (1971). We therefore grant the motion to amend.

From a view of the record in this case, it is the view of the court that the principles of federalism and comity set out by the Supreme Court in Younger v Harris, supra; Samuels v. MacKell, 401 U.S. 66 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975), require dismissal of this action.

In Younger and Samuels the Supreme Court held respectively that when a state criminal proceeding under a disputed state criminal statute is pending against a federal defendant at the time the federal complaint is filed, that unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude federal injunctive or declaratory relief against the challanged statute.

In Huffman v. Pursue Ltd., supra, the court determined that Younger was not limited strictly to criminal prosecutions but that the same principles of equity, comity and federalism were of equal import where a plaintiff sought to enjoin a pending state civil action which is quasi criminal in nature or seeks to further the interests protected by criminal law enforcement. See also Anonymous v. New Your City Bar Ass'n, 515 F.2d 427 (2nd Cir. 1975); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973); Burdick v. Miech, 409 F. Supp 982 (E.D. Wis. 1975); Roy Williams v. Mary Ann Williams, et al., No. 75-1866 (8th Cir. March 31, 1976), 532 F.2d 120.

In Huffman the court also held that where post-trial intervention would in effect annul the results of a state trial, state appellate remedies must be exhausted unless the Younger standars were met. Huffman, supra at 609.

Here the state interests involved in the statute in question are clearly of equal force as those involved in Huffman. The statute itself provides for a criminal penalty or, in lieu thereof, for an injunction to halt the Objectionable activity. §481.02(7) Minn. Stat. The county attorney or the attorney general are expressly granted authority to bring injunction suits in the name of the state or on behalf of the State Board of Law Examiners.

Further the Minnesota Supreme Court has permitted actions to be brought under the statute for injunctive relief by state and local bar associations and members thereof on behalf of the bar and the state. Gardner v. Conway, 234 Minn. 468, 48 N.W. 2d 788 (1951); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940). In Gardner the court pointed out that actions to prevent the unauthorized practice of law are brought primarily in the public interest to vindicate the authority of the court. Supra at 792.

Further it seems apparent that any suit on behalf of the state to enjoin the unauthorized practice of law surely fosters those interests which the Minnesota Legislature sought to protect by declaring the unauthorized practice of law to be a crime. See also Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972), stay denied 409 U.S. 1202 (1972).

Finally, in light of the procedural history of this case, it seems clear that interests of judicial comity which

Younger and its progeny sought to foster are applicable here. It is clear that federal intervention in the form of either declaratory, injunctive or damage relief would effectively annul the results of the state proceeding and deprive the Minnesota courts of the legitimate function of overseeing the trial court's disposition of the constitutional questions which have arisen. Huffman v. Pursue Ltd. at 609. In addition it would frustrate the notion that state courts are equally capable of fulfilling their constitutional mandate to uphold the constitution as the supreme law of the land and cause not only needless friction between the state and federal courts but possibly unnecessary duplication of judicial effort.

Accordingly, since plaintiffs have not as yet exhausted their state appellate remedies, the Younger standards apply, and absent a showing of bad faith, harassment or some other special circumstances, the federal court must defer to the state proceeding. Huffman v. Pursue, supra.

Bad faith or harassment as used in Younger has been generally held to mean that a proceeding has been brought without a reasonable expectation of success. Perez v. Ledesma, 401 U.S. 82, 85 (1971); Kugler v. Helfant, 421 U.S. 117, 126 n. 6 (1974). Here there can be little doubt that this standard has not been met in light of the result of state trial and a review of findings made by the state judge.

A more substantial question is whether the state tribunals are so biased in this case as to constitute extraordinary circumstances making Younger inapplicable as in Gibson v Berryhill, 411 U.S. 564 (1973).

Plaintiffs' argument in this regard appears to be twofold. First, plaintiffs argue that membership in the Minnesota bar is sufficient to constitute impermissible bias. Second, plaintiffs allege actual participation by some members of the Minnesota Supreme Court in the prosecution of plaintiffs. The factual basis of these allegations is extremely tenuous and arises from Justice Scott's presence as Hennepin county attorney when that office conducted an investigation concerning possible unauthorized practice of law by plaintiff and certain meetings between the bar and the court regarding unauthorized practice generally.

Even taking plaintiffs' allegations in their best light, dismissal is still required under Kugler v. Helfant, supra. In Kugler the court indicated the facts of each case must be closely examined with special attention given to the availability of state procedural remedies which tend to prevent biased adjudication.

Here, at most three of the nine active justices are involved, and Minn. Stat. §2.724(2) provides adequate procedures for recusal of any justices who might be biased.

Finally, it would appear that in this case plaintiffs' damage claims are so related to the state proceedings that they may not be separated and pursued without the effect of anulling the state proceedings. Compare Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974), with Sartin v. Comm. of Public Safety of State of Minnesota, et al., No. 75-1482 (8th Cir. May 5, 1976), 535 F.2d 430.

It is therefore

ORDERED

1. Plaintiffs' motion to amend is granted.

2. Plaintiffs' complaint as amended is dismissed.

September 9, 1976

Myron H. Bright
United States Circut Judge

Roy L. Stephenson
United States Circuit Judge

Edward J. McManus, Chief Judge
Northern District of Iowa

1/ While Divorce Education Associates, Inc. was not a party to the state action, Judge Kane's injunction applied to it on the theory that the Thibodeaus adequately represented the interests of the Association. Memp p.15-16.

2/ See Griffin v. Breckenridge, 403 U.S. 88 (1971); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972).

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH DISTRICT

Minnesota State Bar Association,

Plaintiff, File No. 712,517

vs. ORDER AND MEMORANDUM

Divorce Education Association, John Doe, Peter Doe, Mary Doe and Sally Doe, whose names are unknown to the plaintiff,

Defendants.

The above entitled matter came on before the Special Term Judge, the Honorable Jonathan Lebedoff, on April 3,1975, on motions by the defendant Divorce Education Association.

Collins and Buckley, by Morley Friedman, appeared on behalf of the plaintiff; William Ojala, Esq., appeared on behalf of the defendants; Charles and Donna Thibodeau appeared pro se.

Upon all the files, records and proceedings herein and the Court having eard and considered the arguments of counsel,

IT IS ORDERED:

1. That the cause of action against defendant Divorce Education Association is hereby dismissed without prejudice to either party.

2. That each party pay their own attorney's fees.

BY THE COURT:

/s/ Jonathan Lebedoff
Jonathan Lebedoff
Judge of District Court

Dated: April 7, 1975

MEMORANDUM

The Court is of the opinion that the order and memorandum of Judge Kalina are controlling on this decision. While Judge Kalina's ruling is not literally res judicata, it would seem that it would become so if the plaintiff sought to consolidate the Divorce Association case with that of Divorce Associates. This would present an example of trying to circumvent Judge Kalina's order.

If plaintiff did not move to consolidate, then we would have a multiplicity and duplication of litigation here that would result in an unfortunate and unreasonable expense to all of the litigants.

It is for this reason that the Court has dismissed this action against Divorce Education Association without prejudice so that this and other entities can be dealt with pending a final determination of the main action of Minnesota State Bar Association versus Divorce Education Associates, et al, District Court File No. 702,526.

J. L.